RECENT CASES.

AGENCY — ELECTION TO SUE AFTER-DISCOVERED PRINCIPAL. — In an action against the defendant as after-discovered principal the plea alleged that the plaintiff, with full knowledge of the facts, had begun and was continuing a suit at law against the agent for the same cause of action. *Held*, that the plea states a good bar. *Barrel* v. *Newby*, 36 Chic. Legal News 172 (U. S. C. C. A., Seventh Circ.). See NOTES, p. 414.

BANKS AND BANKING — COLLECTION AND REMITTANCE — FOLLOWING PROCEEDS OF NOTE. — The petitioner deposited a note for $506 with a bank for collection and remittance. On November 21 the bank collected the amount, but did not remit. On December 4 it failed, only $29 in cash going to the receiver. The court below decided that the petitioner had no equitable lien on this amount. The petitioner excepted to this judgment. *Held*, that the judgment is correct. *G. Ober & Sons Co.* v. *Cochran*, 45 S. E. Rep. 382 (Ga.). See NOTES, p. 413.

BOUNDARIES — DIVISION OF A LAKE-BED AMONG LITTORAL OWNERS. — *Held*, that the boundary lines of the littoral owners of a non-navigable pond, the waters of which have disappeared, consist of lines drawn to the center of the pond from the points where the side division lines of the various owners intersect the meandered shore line. *Scheifert* v. *Briegel*, 96 N. W. Rep. 44 (Minn.). See NOTES, p. 410.

CANCELLATION OF INSTRUMENTS — ACTION PENDING AT LAW. — The plaintiff brought action in a state court to recover on an insurance policy. The defendant later in a federal court asked for cancellation of the policy on the ground of fraud, alleging inadequacy of legal remedy in that, because of a state statute, it could not remove the pending state action into a federal court without losing its license to do business in that state, and also, because the law as applied in the federal courts was more favorable to the defendant. *Held*, that the bill for cancellation will not lie. *Cable* v. *United States, etc., Co.*, 24 Sup. Ct. Rep. 74. See NOTES, p. 408.

CARRIERS — LIMITATION OF LIABILITY — AGREED VALUATION. — The plaintiff shipped horses under a contract which provided that the freight payable was proportioned to the declared value of the property carried, and that the carrier limited its liability for damage to the value declared by the shipper. The defendant negligently damaged the horses in transit, but they were sold for more than the declared value. The damage, however, did not exceed the agreed amount. *Held*, that the defendant is liable for the actual damage. *United States Express Co.* v. *Joyce*, Ind., App. Ct., Feb. 4, 1904.

The point thus presented is unusual, but except in the federal courts the decisions generally support the principal case. *Brown* v. *Cunard, etc., Co.*, 147 Mass. 58; *Starnes* v. *Railroad*, 91 Tenn. 516. They seem to proceed on the supposition that the whole purpose of the stipulation is to confine the carrier's liability within the amount specified. It is submitted, however, that the meaning of the clause should not be so restricted. The plaintiff has deliberately fixed the value of his goods at a certain sum as a basis of negotiation. Damage is essential to his recovery; but he cannot show damage unless he is allowed to say that the value of his property is greater than the amount he has thus fixed. This, it would seem, he is estopped to do. *Richmond, etc., R. R. Co.* v. *Payne*, 86 Va. 481. Furthermore, if the amount fixed is to be regarded as a merely arbitrary limit to liability without any real relation to the value of the property, the whole agreement would, according to the weight of authority, be void as against public policy. *Moulton* v. *St. Paul, etc., Ry. Co.*, 31 Minn. 85.

CONSTITUTIONAL LAW — ACTIONS BETWEEN FOREIGN CORPORATIONS ON FOREIGN JUDGMENTS. — The New York Code as interpreted by the New York courts denies the use of the state courts in cases between foreign corporations where the cause of action arises outside of the state, even though the cause of action is a judgment obtained in another state. *Held*, that the Code provision does not violate the provision

of the federal Constitution that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." *Anglo-American Provision Co.* v. *Davis Provision Co.*, 24 Sup. Ct. Rep. 92.

A corporation is not a citizen within the meaning of the federal Constitution. *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28. No state is obliged to open its courts for the settlement of foreign disputes between persons not citizens of the United States. *Mexican Nat'l R. R. Co.* v. *Jackson*, 89 Tex. 107. Hence the decision in the principal case appears unquestionable apart from the fact that the action was based on a judgment rendered in a sister state. *Cf. Bawknight* v. *Liverpool, etc., Ins. Co.*, 55 Ga. 194. This additional fact seems immaterial. The constitutional provision that full faith and credit shall be given to such judgments is a rule of evidence only, and does not require that an action shall be allowed on such judgments regardless of other objections to its maintenance. *M'Elmoyle* v *Cohen*, 13 Peters 312; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; see *Huntington* v. *Attrill*, 146 U. S. 657, 672. By refusing to take jurisdiction in the principal case the state courts did not dispute the existence of the cause of action nor deny the validity and conclusiveness of the judgment; they decided only that these foreign parties had no right to enforce any foreign claim in the state courts. Hence, while the question appears never to have been previously adjudicated, the decision is probably sound.

CONSTITUTIONAL LAW — FEDERAL JURISDICTION — ALABAMA FRANCHISE CASES. The Alabama constitution provides for the registration of all electors upon qualification according to certain requirements. The plaintiff, a negro, was denied registration, and, claiming that the registration provisions were in contravention of the Fourteenth and Fifteenth Amendments, brought action to recover damages against the board of registrars, and also applied for a writ of mandamus to compel the board to register him. The Supreme Court of Alabama held that, granting the unconstitutionality of the registration provisions, the board of registrars would then be without authority to register the plaintiff as a voter, and therefore the plaintiff had suffered no legal injury; and that, for the same reason, the board could not be compelled to register the plaintiff. The holdings were taken to the Supreme Court of the United States on writs of error. *Held*, that no federal question is involved. *Giles* v. *Teasley*, U. S. Sup. Ct., Feb. 23, 1904.

The decision is clearly right. No constitutional question was raised for the reason given as the second ground of decision in *Giles* v. *Harris*, 189 U. S. 475. For a discussion of that case, see 17 HARV. L. REV. 130.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — STATUTES RESTRICTING HOURS OF LABOR. — A New York statute rendered it a misdemeanor to require or to permit an employee in a bakery or confectionery establishment to work more than sixty hours per week, or more than ten hours per day unless for the purpose of making a shorter work day on the last day of the week. *Held*, that the statute is constitutional as an exercise of the police power. *People* v. *Lochner*, 177 N. Y. 145.

Legislation restricting the hours of labor is comparatively modern, and its constitutionality has seldom been adjudicated by the courts. Statutes limiting the working hours for minors and women employed in factories have been held constitutional as reasonable regulations to secure the public health. *Commonwealth* v. *Hamilton Mfg. Co.*, 120 Mass. 383; *contra*, *Ritchie* v. *People*, 155 Ill. 98. So also similar statutes affecting the employees in underground mines and smelting works have been held constitutional on account of the peculiarly unwholesome character of the work. *Holden* v. *Hardy*, 169 U. S. 366; *contra*, *In re Morgan*, 26 Col. 415. It is on this ground that a bare majority of the court affirmed the decision in the principal case, which probably goes further than any previous decision with the possible exception of *People* v. *Havnor*, 149 N. Y. 195. The numerous citations from encyclopædias and medical authorities collected in the opinion of Vann, J., at pp. 169–174 would indicate that some reasonable basis existed for considering the occupation peculiarly unhealthful. Consequently the decision that special legislation for this occupation is constitutional appears sound, in view of the fact that a statute is not to be declared void except in a clear case. *Nicol* v. *Ames*, 173 U. S. 509.

CONSTITUTIONAL LAW — POLICE POWER — PROHIBITION OF POSSESSION OF FISH DURING CLOSE SEASON. — The defendant, which had in its possession fish imported from Canada, was sued under a penal statute prohibiting such possession during the close season. *Held*, that this prohibition is unconstitutional. *People* v. *Booth*, 30 N. Y. L. J., 1409 (N. Y. Sup. Ct.).

The court went principally on the ground that the statute enforced a deprivation of property rights. It is well settled that the protection of the public interest in game is

an appropriate occasion for police regulation. *Cf. Phelps* v. *Racey*, 60 N. Y. 10, 14. Rights in personal property are commonly restricted under the police power if the property in question is in itself a menace to the public interest, or if it is an implement apt to be used to the detriment of such interest. *State* v. *Smyth*, 14 R. I. 100; *Lawton* v. *Steele*, 152 U. S. 133. Neither of these circumstances appears in the principal case; the sole relation of the prohibitory statute to the public good lay in the fact that its enforcement would make it difficult for persons entirely unconnected with the fish in question to kill state fish in violation of the law. This consideration has been held to justify similar statutes. *Commonwealth* v. *Gilbert*, 160 Mass. 157; *Magner* v. *People*, 97 Ill. 320. Similarly, a statute prohibiting the hauling of cotton after nightfall, the object being to prevent stealing from cotton fields, was upheld. *Davis* v. *State*, 68 Ala. 58. When the necessity for police regulation exists, it is submitted that the legislature should not be hampered in the selection of the means to be employed. The position of the court is, however, supported by *dicta*. See *People* v. *O'Neil*, 71 Mich. 325. The statute was also considered an interference with foreign commerce. As to this point, see 4 HARV. L. REV. 221; *cf.* 31 U. S. Stat. at Large, c. 553, p. 188.

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES — LEGISLATIVE CONTROL OF MUNICIPAL CONTRACTS. — A Kansas statute provides that no person, in performing any contract with a municipality of the state, may require from an employee more than eight hours of work per day. *Held*, that the statute is constitutional. *Atkin* v. *Kansas*, 24 Sup. Ct. Rep. 124.

A New York statute provides that the wages to be paid on all public work shall be no less than the prevailing rate in the locality where such work is carried on. *Held*, that, as applicable to employees of a municipality, the statute is constitutional. Bartlett, Vann, and O'Brien, JJ., dissented. *Ryan* v. *City of New York*, 177 N. Y. 271.

State courts have so uniformly held such statutes unconstitutional that *Atkin* v. *Kansas* is the first case taken to the federal Supreme Court. The decision is based on the theory that since municipalities are mere political subdivisions of the state, agents to exercise a part of its powers, the state may control all municipal contracts, whether relating to internal affairs or not. This must mean that local self-government in this country exists not by constitutional right, but only by legislative sufferance. The court cites no decision to support its conclusion, and few exist, though *dicta* to that effect are frequent. See the authorities collected in 13 HARV. L. REV. 441. On the other hand, the court ignores numerous decisions to the effect that in matters of local concern a municipality acts, not in a governmental, but rather in a corporate capacity, in which it is as free from state control as a private corporation. *People* v. *Hurlbut*, 24 Mich. 44; 1 DILL. MUNIC. CORP., 3rd ed., § 66, n. 1. This latter view has been adopted in New York with reference to a statute similar to that of Kansas. *People* v. *Orange, etc., Co.*, 175 N. Y. 84. Yet in *Ryan* v. *City of New York, supra*, the reasoning of *Atkin* v. *Kansas* is expressly approved. The court professes to distinguish its two decisions on the ground that one statute restricts the liberty of the city, the other the liberty of persons contracting with the city. But in providing that contractors may exact only an eight-hour day the state is merely laying down one provision of contracts with cities which contractors may make or not as they please. It is on this reasoning that the Kansas statute was sustained. The New York Court of Appeals, therefore, seems committed to the questionable proposition that the state may prescribe the terms of the city's contract with its contractor, but not the terms of the contractor's contract with the city.

CONSTITUTIONAL LAW — RETROACTIVE LAWS — REPEAL OF STATUTE UNDER WHICH RIGHTS HAVE VESTED. — At common law in Massachusetts no right of action could arise out of contracts for the purchase of stock on margin. A statute of 1890 allowed recovery of money paid on such contracts under certain circumstances. An amendment in 1901 added to the requisites for recovery. In consequence of a transaction occurring before the amendment, the plaintiff had a right of action according to the original statute, but not according to the amended statute. *Held*, that the plaintiff cannot recover. *Wilson* v. *Head*, 69 N. E. Rep. 317 (Mass.).

Though the amendment is silent as to rights acquired before its passage, the court construed it as intended to bar such rights. Yet the cases are numerous and practically unanimous to the effect that, even aside from constitutional obstacles to retroaction, a statute has a purely prospective operation unless a purpose to give it retrospective force is clearly expressed. ENDLICH: INTERP. STATS. § 271, and cases cited. And the courts will go much further to construe a statute as prospective where, if retroactive, it might be unconstitutional. *Creighton* v. *Pragg*, 21 Cal. 115; see *Charter* v. *Ives* 55 Pa. St. 81. For this reason there are few actual decisions as to when statutory rights of action are so vested as to be constitutionally protected; and

these few decisions are in conflict. *Van Imwagen* v. *Chicago*, 61 Ill. 31; *Rock Hill College* v. *Jones*, 47 Md. 1, 17. The true rule seems to be that where the party asserting the right given by a remedial statute need do nothing more to perfect it, it cannot be barred by subsequent legislation. See *Steamship Co.* v. *Jolliffe*, 2 Wall. (U. S.) 450. After the repeal of a penal statute of course a private person cannot recover a forfeiture any more than a state can recover a fine. *Norris* v. *Crocker*, 13 How. (U. S.) 429. The statute was purely remedial in the principal case. *Wall* v. *Metropolitan Exchange*, 168 Mass. 282. The decision therefore seems questionable on both the points involved.

CONSTITUTIONAL LAW — TAXATION OF EXPORTS. — An act of Congress imposes a tax upon all filled cheese manufactured in the United States. *Held*, that the tax may be constitutionally imposed upon cheese manufactured for exportation. *Cornell* v. *Coyne*, U. S. Sup. Ct., Feb. 23, 1904.

The precise point involved in the principal case appears not to have been decided previously. There have been, however, *dicta* in other decisions of the Supreme Court, that the only effect of the constitutional prohibition against taxing exports is to prevent taxation of goods in process of exportation, and taxation which discriminates against articles which are to be exported. See *Coe* v. *Errol*, 116 U. S. 517; *Turpin* v. *Burgess*, 117 U. S. 504. The principal case is consistent with these expressions of judicial opinion, for the statute in question applies without distinction to goods manufactured for domestic and for foreign consumption, and the tax is to be levied before shipment. *Cf. Coe* v. *Errol*, *supra*. The decision seems, moreover, to be justified by the purpose of the constitutional provision, which is apparently intended merely to give freedom to export trade, not to establish discriminations in its favor.

CONTRACTS — CONTRACT BY TELEPHONE — PLACE OF MAKING. — In an action on a contract made by telephone, the offerer and acceptor being in different counties, it became important to determine at which end of the line the contract was made. *Held*, that the contract is made at the acceptor's end of the line. *Bank of Yolo* v. *Sperry Flour Co.*, 74 Pac. Rep. 855 (Cal.).

Following the doctrine that a contract made by the exchange of letters is completed at the time and place of mailing the letter of acceptance, it is held that a contract made by telegraph is completed on the filing of the telegram of acceptance. *Garrettson* v. *North Atchison Bank*, 47 Fed. Rep. 867. By the principal case the same doctrine is extended to contracts made by telephone. Logically it follows that the contract is completed whether or not the acceptance is transmitted to the offerer; all that is necessary is that the acceptor should speak into his transmitter in the ordinary manner. Parties contracting by telephone are in much the same position as parties contracting face to face, and in one case as well as the other the acceptor should act as a reasonable man in conveying his acceptance to the offerer. Whether or not the effectiveness of the telephone is such that speaking into a transmitter may reasonably be looked upon as an acceptance is a doubtful question upon which there well may be a difference of opinion.

CONTRIBUTORY NEGLIGENCE — SAVING LIFE OF THIRD PERSON — NEGLIGENCE OF PERSON SAVED AS BAR TO RECOVERY. — Through the negligence of the defendant's servants a woman was in imminent danger of being run over by a car. The plaintiff, in rescuing her, was himself injured. There was evidence that the woman was contributorily negligent in being on the track. *Held*, that her negligence will not bar recovery. *Pittsburg, etc., Ry. Co.* v. *Lynch*, 68 N. E. Rep. 703 (Oh.).

A plaintiff injured in attempting, with risk to himself, to save a third person from danger caused wholly by the defendant's negligence can recover from the defendant, although under ordinary circumstances his recovery would be barred by contributory negligence. *Eckert* v. *Long Island R. R. Co.*, 43 N. Y. 503. The defense of contributory negligence is based upon the injustice of allowing a plaintiff to recover for an injury caused in part by his own fault. But the law regards human life so highly that it does not look upon the incurring of a risk in order to save life as a fault. No previous case has been found in which the third person's danger was caused partly by his own negligence. It would seem, however, that the value of a person's life is not materially decreased because he has been careless It follows that one who runs a risk to save a negligent person from danger should not be considered at fault, and should not be barred from recovery for injury of which the defendant's negligence is one of the causes.

CORPORATIONS — BILL BY MINORITY STOCKHOLDERS — RECOVERY OF ATTORNEY'S FEES. — Minority stockholders of a corporation successfully maintained a bill in equity to restrain and cancel an attempted transfer of the entire corporate property.

Held, that they are entitled to attorney's fees. *Forrester* v. *Boston, etc., Co.*, 74 Pac. Rep. 1088 (Mont.).

It has generally been held that where a person, by a bill to secure the due application of a fund in which he is interested, succeeds in bringing it under control of the court for the common benefit of all concerned, he is entitled to his costs and counsel fees before its distribution, *Trustees* v. *Greenough*, 105 U. S. 527; so in the case of a bill by creditors of a corporation bringing into court its property fraudulently transferred. *Central R. R.* v. *Pettus*, 113 U. S. 116. Where also a minority stockholder by his bill increased the assets of the corporation by obtaining a reconveyance of property fraudulently transferred, he was allowed attorney's fees. *Grant* v. *Lookout Mountain Co.*, 93 Tenn. 691. Where the stockholder succeeds in preserving the assets of the corporation by preventing a wrongful conveyance, the same reasons exist for allowing the recovery of attorney's fees. *Meeker* v. *Winthrop Iron Co.*, 17 Fed. Rep. 48; *contra*, *Alexander* v. *Atlanta, etc., R. R. Co.*, 113 Ga. 193. Such is the result reached in the principal case. Unfortunately the scandal connected with the Montana copper cases, of which this is one, may weaken it as an authority.

CORPORATIONS — ULTRA VIRES — CAPACITY OF NATIONAL BANK TO BECOME PARTNER. — A debtor of the defendant national bank conveyed to it as security transferable shares in a partnership. The bank shared in the management of the partnership, which thereafter contracted debts and became insolvent. The plaintiff seeks to hold the bank liable as a partner. Some of the partners were insolvent. *Held*, that the bank is not a partner but a part owner liable for only its proportional share of the debts. *Merchants' National Bank* v. *Wehrmann*, 68 N. E. Rep. 1004 (Oh.). See NOTES, p. 407.

DECEIT — NEGLIGENCE OF PLAINTIFF AS DEFENSE. — The defendant, to induce the plaintiff to buy a stock of goods, gave him an inventory showing a total value much larger than the figures actually footed up. The plaintiff had only to cast up the column of hundreds to detect the error. It was proved that he was a man of exceptional shrewdness in business dealings. *Held*, that an instruction to the jury in an action of deceit that the plaintiff is required to exercise ordinary care and prudence is harmless error, as the defendant is held up to his own standard of care, which was above the ordinary. *Kaiser* v. *Nummerdor*, 97 N. W. Rep. 932 (Wis.).

The court holds that the doctrine of contributory negligence has no application to the law of deceit, and contends that the plaintiff is required, not to exercise ordinary care, but to give attention to what is before him according to his own standard in business dealings. Although the substitution of the personal for the ideal standard of the man of ordinary prudence has the advantage of giving opportunity to hold rogues liable for frauds practised upon the weak-minded and inexperienced, still the holding of the court is open to objection on principle. Deceit like battery is a wilful injury, and the rule, well settled in the latter case, that the law imposes no duty of care upon the victim, would seem to apply with equal force to the former. *Steinmetz* v. *Kelly*, 72 Ind. 442. There is a tendency among the authorities to recognize this view. *Dobell* v. *Stevens*, 3 B. & C. 623; *Speed* v. *Hollingsworth*, 54 Kan. 436. But it must be acknowledged that a great majority of the cases hold that the plaintiff may be barred by negligence. *Slaughter's Administrator* v. *Gerson*, 13 Wall. (U. S.) 379; *Poland* v. *Brownell*, 131 Mass. 138.

EASEMENTS — EXTENT OF PUBLIC EASEMENT IN HIGHWAY. — The Boston Transit Commission proposed, under legislative authority, to construct a subway under certain public streets in which the plaintiffs owned the fee, without a formal taking of the land. *Held*, that the plaintiffs are not entitled to an injunction to restrain such action, since the subway is not an additional servitude. *Sears* v. *Crocker*, 69 N. E. Rep. 327 (Mass.). See NOTES, p. 409.

EVIDENCE — ADMISSIBILITY OF RULES OF RAILWAY COMPANY TO PROVE NEGLIGENCE. — *Held*, that evidence of violation of rules of a street railway company by its motorman is admissible to prove negligence toward a person injured. *Stevens* v. *Boston Elevated Ry. Co.*, 32 Banker & Tradesman 130 (Mass. Sup. Ct., Jan., 1904).

The court decides upon authority and upon the analogy of cases allowing the violation of statutes to be shown as evidence of negligence. This analogy is obviously unsound, for, whereas a statute establishes a duty to the public, the rules of a railway regulate only the obligations of employee to employer. The weight of authority, it is true, favors the decision. *Cincinnati St. Ry. Co.* v. *Altemeier*, 60 Oh. St. 10. But the contrary view is not without support. *Fonda* v. *St. Paul City Ry. Co.*, 71 Minn. 438. The cases which admit the evidence let it in as part of the *res gestæ* and as an admission against interest. On the other hand, regulations made after the accident are

almost uniformly excluded on grounds of irrelevancy and expediency. *Columbia R. R. Co.* v. *Hawthorne*, 144 U. S. 202. How the making of regulations can be an admission in one case and not in the other, or how expediency demands exclusion in one case and not in the other, is not clear. Since the care of the average man is the test of negligence, it is difficult to see how a railway's private standard of care as expressed in its rules can be relevant in either case. See *Davis* v. *Manchester*, 62 N. H. 422.

EVIDENCE — REAL EVIDENCE — POWER TO COMPEL PHYSICAL EXAMINATION OF WITNESS. — In an action by a physician to recover for services rendered a railroad in a wreck, a witness refused to exhibit to the jury his leg which had been injured in the wreck and treated by the plaintiff. *Held*, that the court cannot compel him to exhibit his leg. *McKnight* v. *Detroit, etc., Ry. Co.*, 97 N. W. Rep. 772 (Mich.).

By the weight of authority in this country, the court may, within bounds of decency, compel the plaintiff as witness in an action for personal injuries to exhibit the injured part of the body to the jury or to submit to examination by competent persons. *Graves* v. *City of Battle Creek*, 95 Mich. 266; *contra, Union Pacific Ry. Co.* v. *Botsford*, 141 U. S. 250. The principal case explains this on the ground that by the plaintiff's appeal for justice he impliedly agrees to disclosures necessary to attain justice. But, it is submitted, the true basis is the lack of any privilege of witnesses in this respect, because the law regards the advancement of justice as more important than personal immunity from examination. One example of this attitude of the common law is the writ *de ventre inspiciendo* to determine the possibility of a posthumous heir. *In re Blakemore*, 14 L. J. Ch. N. S. 336. If this is so, the principal case, which is apparently one of first impression, should be differently decided.

EVIDENCE — TESTIMONY GIVEN AT FORMER TRIAL — LACK OF JURISDICTION. The New York Code provides that evidence given in a former action or special proceeding may be read in a subsequent trial of the same subject matter between the same parties if the witness has died since the former action. In the present case the referee before whom the evidence in the former proceeding was given was later held to have acted without jurisdiction. *Held*, that the evidence is not admissible in the subsequent trial. *Deering* v. *Schreyer*, 88 N. Y. App. Div. 457.

The provision of the Code is substantially declaratory of the common law. The chief objections to hearsay evidence do not apply to the testimony of deceased witnesses given in a former trial between the same parties concerning the same subject matter; for the testimony has been given under oath, and the witness has been subject to cross-examination. *Minneapolis Mill Co.* v. *Minneapolis, etc., Ry. Co.*, 51 Minn. 304, 315. Hence such testimony is very generally held admissible. *Yale* v. *Comstock*, 112 Mass. 267. It might appear at first sight to be immaterial whether the ground for setting aside the result of the former proceedings was lack of jurisdiction or some other cause. Yet the defect in jurisdiction has clearly a different bearing from that of most other defects in procedure. For if the court in the former proceeding had not jurisdiction the parties were under no obligation to appear, nor could they be in any way concluded by the result; nor was the witness bound by his oath. *Collins* v. *State*, 78 Ala. 433. Hence, while no decision directly in point has been found, the conclusion reached appears to be entirely sound. See *State* v. *Johnson*, 12 Nev. 121, 124.

EXECUTORS AND ADMINISTRATORS — OBLIGATION OF DISTRIBUTEE TO REFUND — PAYMENT UNDER MISTAKE OF FACT. — The plaintiff, an ancillary administrator in West Virginia, believing that there were no creditors of the deceased in that state, remitted the assets to the domiciliary administrator in Virginia. The latter partially distributed the estate. Having been forced to pay a judgment subsequently obtained by a West Virginia creditor of the estate, the plaintiff sued a Virginia distributee for contribution. *Held*, that the plaintiff can recover. *McClung* v. *Sieg*, 46 S. E. Rep. 210 (W. Va.).

Ordinarily, an executor paying a legatee or distributee is bound by his admission that the assets are sufficient and cannot force either to refund. *Bumpass* v. *Chambers*, 77 N. C. 357. But overpayment under innocent mistake of fact gives an executor a right at law for money had and received. *Northrop* v. *Graves*, 19 Conn. 548. The West Virginia administrator in the principal case, therefore, could have forced a West Virginia distributee to refund. But it is hard to see how he can get any such right against the distributee in Virginia. The domiciliary administrator in Virginia is the person to whom the money has been paid under mistake of fact, and who is therefore under a liability to pay it back. He may still retain enough of it to indemnify the plaintiff. The latter should be forced to exhaust his remedy against him before coming against the distributee. *Selover v. Coe*, 63 N. Y. 438.

FEDERAL COURTS — VENUE — SUIT BY ASSIGNEE OF CHOSE IN ACTION. — A West Virginia corporation assigned to the plaintiff, a New York citizen, a cause of action against the defendant, a Pennsylvania corporation. In an action brought by the plaintiff in the federal circuit court in the district of his residence, the defendant entered a general appearance, but moved to set aside the summons for lack of jurisdiction as the action was not brought within the residence of either the assignor or the defendant. The Judiciary Act, Aug. 13, 1888, c. 866 (1 Supp. U. S. Rev. Sts. 612) provides that in suits in the circuit courts between citizens of different states "suit shall be brought only in the district of the residence of either the plaintiff or the defendant"; and that no circuit court shall "have cognizance of any suit . . . unless such suit might have been prosecuted in such court . . . if no assignment or transfer had been made." *Held*, that the court has jurisdiction. *Bolles* v. *Lehigh Valley R. R. Company*, U. S. C. C., S. D. N. Y., Feb. 9, 1904.

The main purpose of the statute in question is to deny to the circuit courts jurisdiction over assigned causes of action when diversity of citizenship is lacking, either between the original parties or between the present plaintiff and the defendant. *Portage City Water Company* v. *Portage*, 102 Fed. Rep. 769. Clearly this purpose is not violated by allowing the present action to be maintained. Moreover, the result is not inconsistent with any provision of the statute. Were the present plaintiff the assignor instead of the assignee, the defendant, having entered a general appearance without objection, would be within the jurisdiction of the present court, because the clause providing that action shall be brought only at the residence of the plaintiff or the defendant concerns not jurisdiction but merely procedure: like personal privilege, it is waived when the defendant enters a general appearance without objection. *Interior Construction, etc., Co.* v. *Gibney*, 160 U. S. 217. Since the action might thus be brought in the present court had there been no assignment, and since diversity of citizenship exists between the assignee and the defendant, the assignee can maintain the action in this case.

ILLEGAL CONTRACTS — MARRIAGE BROKERAGE CONTRACTS. — The plaintiff filed a bill to foreclose a mortgage given by the defendant to secure a debt, containing the condition that it should be void and the debt extinguished if one Revett, who was about to marry the plaintiff's daughter, should do so at once, and should faithfully perform the marriage contract for six years. No performance of the condition except the marriage itself was ever made. *Held*, that the mortgage cannot be foreclosed, since it forms a part of an illegal transaction. *Jangraw* v. *Perkins*, 56 Atl. Rep. 532 (Vt.).

Agreements to bring about marriage between persons not already engaged to be married have always been considered against public policy, illegal, and void. *Johnson's Adm'r* v. *Hunt*, 81 Ky. 321. The reasons given, that such contracts increase the chances of unhappy marriages, apply equally to agreements to hurry through a marriage between persons who have agreed to marry but still have the chance to reconsider. *Morrison* v. *Rogers*, 115 Cal. 252. The object of giving and receiving the mortgage in the principal case was not only to secure a debt but also to hasten the marriage of the plaintiff's daughter. This illegality of one of the essential objects of the agreement vitiates the entire transaction. *Bishop* v. *Palmer*, 146 Mass. 469.

INTERNATIONAL LAW — ALLEGIANCE — STATUS OF PORTO RICANS. — The petitioner in *habeas corpus* proceedings, a native Porto Rican, was detained under a statute authorizing immigration officers to prevent the landing of any alien likely to become a public charge. *Held*, that the petitioner is not an alien. *Gonzales* v. *Williams*, 24 Sup. Ct. Rep. 177. See NOTES, p. 412.

MASTER AND SERVANT — FELLOW SERVANTS — FELLOW SERVANT OFF DUTY. — A section hand employed by the defendant was boarded and lodged at the section house situated upon the defendant's premises. He left the house one evening after working hours by the path used by the section hands, and in crossing one of the tracks was killed through the negligent operation of cars by the defendant's servants. *Held*, that his administrator cannot recover. *Dishon* v. *Cincinnati, etc., Ry. Co.*, 126 Fed. Rep. 194 (Circ. Ct., E. D. Ky.).

The only question in the case is whether the plaintiff's intestate, being off duty at the time of the accident, was a fellow servant of the operatives in charge of the cars. The court appeals to the commonly accepted reason underlying the fellow servant rule, namely, that the employee assumes at the outset the risks of the employment, including the negligence of his fellow servants. *Farwell* v. *Boston, etc., R. R. Corp.*, 4 Met. (Mass.) 49. It seems a fair contention that this assumption of risk extends to times when the servant, though not on duty, is in pursuance of a right enjoyed only by

virtue of his contract of service. This view is well supported upon authority. *Ewald* v. *Chicago, etc., R. R. Co.*, 70 Wis. 420; *International, etc., Ry. Co.* v. *Ryan*, 82 Tex. 565. The cases cited against it are nearly all cases where a servant was injured while being conveyed to or from work upon his master's vehicle. *Dickinson* v. *West End St. Ry. Co.*, 177 Mass. 365; *McNulty* v. *Pennsylvania R. R. Co.*, 182 Pa. St. 479. It seems quite possible to distinguish most of them upon the ground that the parties by their own agreement stood in the relation to each other of carrier and passenger.

RAILROADS — JUDGMENT LIEN — SALE ON EXECUTION OF PORTION OF ROADBED. A railroad company, having constructive notice of a judgment lien on a piece of land, bought it and used it for railroad purposes. *Held*, that the land may be decreed to be sold to satisfy the lien. *Fulkerson* v. *Taylor*, 46 S. E. Rep. 309 (Va.); *Flanary* v. *Kane*, 46 S. E. Rep. 312 (Va.).

It is usually held that the lien of a judgment creditor of a railroad corporation attaches to the whole property, including the franchise, and that detached portions of the roadbed cannot be sold in satisfaction. *Georgia* v. *Atlantic, etc., R. R. Co.*, 3 Woods (U. S. C. C.) 434. It is said that the property and the franchise must be kept together to protect the interests of the public in the continued operation of the highway. In one case at least this rule has been applied to a vendor's lien arising from the sale of land. *Dayton, etc., R. R. Co.* v. *Lewton*, 20 Oh. St. 401. But the usual holding is that the vendor has a lien enforceable by the sale of the particular piece of land conveyed by him. *Walker* v. *Ware, etc., Ry. Co.*, L. R. 1 Eq. 195. The decision in the principal case seems clearly correct, for the lien holder has no direct right against the railroad company. He has a vested right against the land, and a denial of such right in the interest of the public without a taking under the power of eminent domain is unjustifiable. The decision is in accord with the only case found squarely in point. *Chapman* v. *Pittsburgh, etc., R. R. Co.*, 26 W. Va. 299.

RES JUDICATA — MATTERS CONCLUDED — JUDGMENT ON A FORMER JUDGMENT. In 1896 a Kentucky circuit court decided that the Hewitt Law constituted an irrevocable contract exempting the defendant bank from certain taxes. In 1898, in a suit between the same parties, a federal court enjoined the attempt to collect the tax for future years, holding the judgment of 1896 *res judicata* on the question of the existence and validity of the contract. Subsequently the Kentucky Court of Appeals, in reversing the judgment of 1896, decided that no irrevocable contract existed, and the case was remanded. In the new trial the bank introduced the decree of 1898 as rendering the irrevocability of the contract *res judicata*. *Held*, that the decree rendered the irrevocability of the contract *res judicata*. *Deposit Bank* v. *Board of Councilmen*, 24 Sup. Ct. Rep. 154. See NOTES, p. 406.

RESTRICTIVE AGREEMENTS — CHATTELS SOLD BY MANUFACTURER WITH RESTRICTIONS AS TO RETAIL PRICE. — The plaintiff company, manufacturers of tobacco, was accustomed to sell goods to wholesale dealers subject to certain conditions fixing minimum retail prices for the sale of the goods. In order to charge retail dealers with notice of the conditions of the original sale, a label setting forth those conditions was affixed to each box of tobacco. This action was brought against the defendant company, a firm of retail dealers, to restrain it from disregarding the conditions. *Held*, that such restrictions are not binding upon the defendant company. *Taddy & Co.* v. *Sterious & Co.*, 20 T. L. R. 102 (Eng., Ch. D.). See NOTES, p. 415.

SALES — INADEQUACY OF PRICE AS GROUND FOR VACATING SHERIFF'S SALE. — At an execution sale to satisfy a judgment in favor of a firm, one of the partners purchased for $140 land worth $2000. The execution defendant filed a motion to have the sale set aside because of inadequacy of consideration. *Held*, that the sale will be set aside. *Gimmons* v. *Sharpe*, 35 So. Rep. 415 (Ala.).

It is a general principle that inadequacy of price is not of itself sufficient ground for setting aside a sheriff's sale. *Cooper* v. *Galbraith*, 3 Wash. (U. S. C. C.) 546. Many courts, however, because of their reluctance to see the debtor's property sacrificed, have held that where the inadequacy is so gross as to shock the conscience it may be regarded as evidence of fraud, and in such cases the slightest additional circumstance indicating fraud, unfairness, or irregularity of process has been held sufficient to invalidate the sale. *Graffan* v. *Burgess*, 117 U. S. 180. A few courts have held that it is the sheriff's duty not to sell for a grossly inadequate price and on that ground alone have granted relief. The principal case relies upon such a decision. See *Henderson* v. *Sublett*, 21 Ala. 625. It would seem, however, that while the sheriff might be liable for a breach of such duty, it would afford no ground for depriving the innocent

purchaser of his bargain. In jurisdictions allowing the execution defendant a right of redemption, there can be no need to set a sale aside because of inadequacy of price. *Mixer* v. *Sibley*, 53 Ill. 61.

SALES — SALE OF STANDING TREES — CONSTRUCTION OF CONTRACT. — The plaintiff sold and conveyed to the defendant's assignor all the standing trees of a certain size on the plaintiff's land. The contract allowed the buyer five years within which to cut and remove the timber, the term to commence when the buyer began to manufacture the timber into lumber. Thirteen years after the contract, the defendant cut and removed the trees. *Held*, that the plaintiff may recover in trespass the value of the trees. *Bunch* v. *Elizabeth City Lumber Co.*, 46 S. E. Rep. 24 (N. C.). See NOTES, p. 411.

TITLE AND POSSESSION — MASTER'S RIGHTS TO GOODS FOUND BY SERVANT. — The plaintiff while cleaning out an old building for the defendant unearthed a sum of money, of which the defendant took possession. The owner of the money was unknown. *Held*, that the plaintiff can maintain trover for the money. *Danielson* v. *Roberts*, 74 Pac. Rep. 913 (Ore.).

The question raised in the principal case has been differently decided in England. *South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q. B. 44. The reasoning of the court in that case has been criticised. See 10 HARV. L. REV. 444. The result, however, is believed to be sound. It may be conceded that in general the mere fact that a chattel is found upon another's premises or by one in his employ does not alter the right of the finder to the possession of the chattel. *Bridges* v. *Hawkesworth*, 21 L. J. Q. B. 75; *Hamaker* v. *Blanchard*, 90 Pa. St. 377. But where it can fairly be assumed that a part of the servant's duty is to find for the master on his premises, the latter's right to hold the thing found as against every one but the true owner should be absolute. This distinction seems to have been taken by the English courts. *Regina* v. *Pierce*, 6 Cox C. C. 117; *McDowell* v. *Ulster Bank*, 33 Ir. L. T. 225. In the principal case the nature of the plaintiff's employment makes it reasonable to assume the existence of such a duty, and the decision is therefore questionable.

TITLE AND POSSESSION — RIGHT TO POSSESSION OF UNCLAIMED ARTICLES FOUND IN SHOP. — The plaintiff found a jewelled pin on the counter of the defendant's shop. She showed it to the superintendent, who took the pin to examine and refused to give it back, saying that he would keep it for the owner. No owner having appeared, the plaintiff claims the pin. *Held*, that the plaintiff is entitled to possession. *White* v. *Daniels*, 30 N. Y. L. J. 1223 (Munic. Ct., City of New York, Seventh Dist.).

Since the possessor of a chattel has a right to it good against all the world but the true owner or those claiming under him, the rights of the parties should depend on who first got possession. Power of control and an intention to make a use inconsistent with control by any one else, are the distinctive attributes of possession. See 6 HARV. L. REV. 443. The defendant here had no actual intent to assume control to the exclusion of others; and as he invited the public to his shop, such an intent cannot be implied as part of a general intent to exclude people from the premises. *Cf. South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q. B. 44. Some cases hold that if chattels are put intentionally in a place and forgotten, they are in the care of the person owning the premises. *Kincaid* v. *Eaton*, 98 Mass. 139. The conclusive answer is that the owner of the premises never consented to responsibility for them. The pin therefore remained in the constructive possession of the original owner until the plaintiff took actual possession of it.

TORTS — INJURY TO LICENSEE — CONDITION OF PREMISES. — The defendant, a railroad corporation, tacitly allowed the public to use the space between its tracks as a way. Just before reaching an unguarded cut, the path diverged across the track. The plaintiff, who was using the path at night, did not know that it diverged, and not seeing the cut in the darkness, fell into the opening, and was injured. *Held*, that the plaintiff may recover. *Matthews* v. *Seaboard, etc., Ry.*, 46 S. E. Rep. 335 (S. C.).

It is not entirely clear from the decision whether the court proceeded on the assumption that the defendant was to be considered as inviting, or merely as permitting the plaintiff to use the way in question. The law is in some conflict whether upon these facts an invitation could be implied; but the weight of authority holds that the mere passive acquiescence by a landowner in the use of his premises by the public can never amount to an invitation. *Lingenfelter* v. *Baltimore, etc., Ry. Co.*, 154 Ind. 49. But if the plaintiff is to be considered as a bare licensee, the position of the court is clearly

untenable. A licensee assumes all the risks which result from the defective condition of the premises except hidden dangers of which the licensor is aware and he himself is ignorant. *Gautret* v. *Egerton*, L. R. 2 C. P. 371. And it seems clear that defects of long standing are not considered as hidden dangers within the meaning of the rule when they are concealed only by reason of the darkness of the night. *Reardon* v. *Thompson*, 149 Mass. 267; *Hounsell* v. *Smyth*, 7 C. B. (N. S.) 731.

TRUSTS — CONVEYANCE TO TRUSTEE FOR ONE OF TWO EQUITABLE CLAIMANTS. The plaintiff and the *cestui que trust* of a trustee each had equitable rights to property the legal title to which was in the trustee, of which rights the plaintiff's was the prior. The trustee conveyed the property to the defendant, who agreed to hold it for the benefit of the *cestui*. No notice of the plaintiff's rights on the part of the defendant or *cestui* was shown. A bill was filed to have the defendant declared trustee of the property for the plaintiff. *Held*, that the defendant, since he is not a purchaser for value, cannot hold the property as against the plaintiff. *Seacoast R. R. Co.* v. *Wood*, 56 Atl. Rep. 337 (N. J. Ch.).

If the holder of the legal title to trust property conveys to the second equitable claimant who is ignorant of the prior equity, the latter may retain the title. *People* v. *Swift*, 96 Cal. 165. The theory is that as each is entitled in justice to the property, equity will not disturb him who gets the legal title in good faith. In the principal case, however, the *cestui* did not himself get title. But if a purchaser for value without notice from a trustee has the conveyance made to a third person in trust for him, such person can hold the title. *Willoughby* v. *Willoughby*, 1 T. R. 763; *Stokes* v. *Riley*, 121 Ill. 166. In these cases the third person is a mere depository of the legal title to which the purchaser has otherwise the exclusive right. The title cannot be disturbed without wronging the *bona fide* purchaser, and for that purpose equity will not lend its aid. The present case seems similar in principle. As against the plaintiff, the *cestui's* right to have the legal title held for him by the defendant should be considered complete.

WATERS AND WATERCOURSES — PERCOLATING WATERS — RIGHT TO APPROPRIATE. — The defendant company sunk a well on its own land and used the water to supply its locomotives and machine shops, thereby cutting off all percolating water from the plaintiff's well, which had been used for domestic purposes only. *Held*, that the defendant company must be limited to the reasonable use of such water in connection with the use of its land, as land. *East* v. *Houston & T. Cent. R. R. Co.*, 77 S. W. Rep. 646 (Tex., Civ. App.).

This decision gives the support of Texas to the view prevailing in New York, California, and New Hampshire. For a discussion of the question, see 16 HARV. L. REV. 295.